



DEPARTMENT OF THE AIR FORCE  
WASHINGTON, D.C.

Office Of The General Counsel

May 30, 2013

SAF/GCA  
1740 Air Force Pentagon  
Room 4C934  
Washington, DC 20330-1740

Catherine McMullen  
Chief, Disclosure Unit  
United States Office of Special Counsel  
1730 M. Street, N.W., Suite 300  
Washington, DC 20036-4505

Re: OSC File Nos. DI-12-2390

Dear Ms. McMullen:

After investigation, the Air Force submitted its January 28, 2013 Report of Investigation (ROI) to the Office of Special Counsel (OSC) in the above-referenced case, wherein both allegations referred to the Air Force by OSC were not substantiated. On April 19, 2013, OSC contacted my office, by telephone and in writing, requesting the Air Force alter its ROI to "clarify and revise the wording in its report to appropriately resolve the issues identified" by OSC. The issues identified by OSC relate to the "LMCA allegation" referred by OSC to the Air Force for investigation -- that their records show the whistleblower did make an "LMCA" allegation to OSC and that OSC adequately explained its rationale for the referral in their response on November 29, 2012. As set forth below, we respectfully disagree with OSC and decline to alter the ROI.

OSC's referral letter to the Secretary of the Air Force, dated August 7, 2012, directed the Air Force to investigate allegations of wrongdoing at the Directed Energy Directorate of the Air Force Research Laboratory at Kirtland AFB, New Mexico related to authorization to transfer equipment from the Air Force to Sandia National Laboratories. In their referral letter, OSC identified two processes which purportedly govern the transfer of government equipment -- the Economy Act and the "LMCA" process. With regard to the LMCA allegation, OSC stated that "it appears the Air Force Logistics Materiel Control Activity (LMCA) has an alternative transfer authorization for transfers" of equipment under AFMAN 23-110.

According to his testimony taken during the investigation, the whistleblower denied making the allegation that the LMCA process has an alternative transfer authority akin to the Economy Act. On November 21, 2012, the Air Force, without assistance from the whistleblower and finding no such procedure in the AFMAN, formally requested clarification from OSC on the

“LMCA” process allegation. We stated that the allegation that an internal agency manual (such as AFMAN 23-110) could create authority akin to the Economy Act was facially nonsensical because “it is a basic tenet of fiscal law that statutory authority (as opposed to administrative regulation) is necessary for transfers between appropriations.” In light of the fact that the assertion within the allegation is inconsistent with elementary principles of fiscal law, the Air Force requested OSC’s clarification on the meaning of the “LMCA” allegation, as well as a cite to the specific reference in AFMAN 23-110 that OSC was relying upon in the allegation. In its November 29, 2012 response, OSC stated “[i]t was alleged that *beyond statutory procedures* set forth by the Economy Act, the Air Force may have an alternative procedure through the Air Force Logistics Material Control Activity for processing equipment transfers or loans.” (Emphasis added). OSC did not respond substantively, but rather simply stated “[b]ecause OSC is not authorized to investigate disclosures and has limited access to agencies’ policies, the Air Force is in the best position to determine whether an alternative transfer process exists and if that process was utilized to authorize the equipment transfer at issue.”

Based on its investigation into the LMCA allegation, the Air Force concluded in its Report that no such “LMCA” authority exists to transfer equipment, that AFMAN 23-110 is in no way similar to the Economy Act, that the whistleblower in his testimony denied making this “LMCA” process allegation, and that OSC could not explain their rationale for referring this “LMCA” process allegation.

In its request to alter the ROI, OSC takes issue with the latter two conclusions, stating OSC “strongly disagree[d] with the agency’s conclusions and how this matter is addressed in the AF report.” In its April 19<sup>th</sup> request, OSC stated that their records show the whistleblower did make this “LMCA” allegation to them and that OSC adequately explained their rationale for the referral in their response on November 29, 2012. We address both of these issues below.

OSC argues that “the AF’s excerpts of the WB’s testimony do not reflect that the WB was not aware of the LMCA allegation.” However, according to his testimony, the whistleblower denied making the allegation that the LMCA process has an alternative transfer authority akin to the Economy Act. Throughout his entire interview, the whistleblower based his complaint firmly and solely on the Economy Act itself. When he was read a summary of OSC’s referral letter, the whistleblower stated he did not make an allegation of an LMCA process violation. While it was clear he knew of the LMCA and what they generally do, it was equally clear he found it irrelevant to the investigation. In fact, he stated he was not sure of the LMCA’s role with the equipment at issue because the equipment was not accountable. He stated it would have been a “courtesy” to alert the equipment custodian at the LMCA that such non-accountable equipment was being shipped out, but that “[the equipment custodian] wouldn’t really need, need to really know.” In the context of his testimony, it was absolutely clear the whistleblower was not alleging a violation of AFMAN procedures. When asked the question “is there something specifically that prohibited Dr. Pennington from being authorized to transfer non-accountable equipment?” he answered simply “[y]es, the 1934 [sic] Economy Act” and he did not reference the LMCA. When asked what authority he cited to in making the allegation, he never once mentioned the AFMAN. In the IO’s attempt to investigate the LMCA allegation, he asked the whistleblower for contact information to the LMCA office. Perhaps most telling, when the whistleblower emailed the IO the LMCA’s phone number, he immediately added “probably not

useful because the equipment was not accountable.” **The evidence overwhelming supports the conclusion that the whistleblower stated he did not make an allegation of an LMCA process violation; no evidence was found to the contrary. As the ROI reflects the evidence adduced during the investigation, the Air Force has no evidence to support changing its Report as requested by OSC.**

On April 25, 2013, the Air Force emailed OSC stating that “the Air Force has no evidence” of this allegation from its investigation. In order to support the requested change to the ROI, the Air Force requested “documentation (or appropriate excerpts)” from OSC, indicating that the “best evidence for resolving this issue” would be the whistleblower’s complaint to OSC.<sup>1</sup> OSC refused to provide excerpts of relevant documents, and apparently took offense to the request by stating in an email on May 2, 2013 that releasing this information “would jeopardize the integrity of [their] confidential process” and would be against OSC policy. This position is inconsistent with OSC’s past practice.<sup>2</sup>

In its email of May 2, 2013, OSC also stated “We are quite disturbed that you seem to be questioning OSC’s good faith assurance that this information was provided to our office by the whistleblower. That is a very serious charge and, to be crystal clear, it is utterly baseless. OSC is dedicated to its mission and does not invent allegations. Wholly unfounded intimations to the contrary in the AF’s 1213(d) investigation report amount to ‘blaming the messenger’ and reflect poorly on the AF’s seriousness in this matter.”

Nothing could be further from the truth. First, the Air Force made no such “charge” against OSC. The Air Force submitted its Report, based on the evidence gained in a thorough investigation, and when OSC asked the Air Force to alter it in a way that conflicted with the evidence it had collected, the Air Force simply requested that OSC supply evidence necessary to make such a change. OSC declined.<sup>3</sup> Second, based on OSC’s referral of this allegation (which happened to be both factually and legally inaccurate), Air Force personnel spent countless hours investigating and researching the matter, which included multiple attorneys reviewing the

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<sup>1</sup> The Air Force response stated as follows: “As we stated in our report, the whistleblower essentially denied making this assertion when questioned by the IO. As I understand it, OSC is now asking the Air Force to alter its 1213 report, because the whistleblower did, in fact, make this allegation to your office. However, the Air Force has no evidence of such allegation being made. As you can understand, in order to consider and/or justify altering the language of its 1213 report, the Air Force would need additional information. The best evidence for resolving this issue would, of course, be the complaint made by the whistleblower to your office. Please provide that documentation (or appropriate excerpts) to us so that we may fully review your concerns, and provide a revised report or supplemental report as may be appropriate.”

<sup>2</sup> OSC has previously released complainant-provided materials to the Air Force. (Reference OSC file number DI-11-0487 (OSC mailed to the Air Force two enclosures of multiple emails provided to OSC by the whistleblower regarding allegations); OSC file number DI-12-0623 (OSC mailed to the Air Force voluminous materials provided to OSC by the whistleblower regarding allegations)). The Air Force believed that its request for similar information in this case was reasonable based on OSC’s recent past practice responding to the Air Force’s earlier legitimate requests.

<sup>3</sup> The Air Force is certain of the following: OSC included the LMCA allegation in its referral letter to the Air Force, and the whistleblower during the investigation denied making such an allegation. One can surmise that either OSC framed the allegation or the whistleblower forgot he made it. Regardless, the Air Force investigated the allegation and found it to be baseless.

thousands of pages in AFMAN 23-110 trying to discern what could possibly have been meant by the allegation – to no avail. The allegation as referred was nonsensical in that, under basic general fiscal law principles applicable to the federal government, transfer authority must be statutory, not administrative. Therefore, the Air Force went out of its way to review the matters to be sure it did not misinterpret the referred allegation or the whistleblower's concerns. After having expended substantial resources trying to ascertain the import and substance of the allegation and having no luck with that approach, the Air Force took the unusual step of requesting assistance from OSC to clarify the allegation OSC referred to the Air Force for investigation.

As set forth above, the Air Force could not have taken this matter any more seriously. Thus, it is unfortunate that when asked to assist the Air Force simply by explaining what was meant in their referral letter, OSC's response did not go beyond reiterating the generic statement found in OSC's referral letter that "the Air Force may have transfer authority through the LMCA that is similar to the Economy Act." Considering that prior to referring this allegation to the Air Force, OSC must have reviewed the information in the disclosure and made a good faith determination under 5 U.S.C. § 1213(b) that there was a "substantial likelihood" that the allegation "discloses a violation," it was wholly appropriate for the Air Force to look to OSC for clarification of the framed allegation, especially in light of the whistleblower's abjuration of the allegation.

In its November and April emails, OSC explained that, "beyond statutory procedures set forth in the Economy Act, the Air Force may have an alternative procedure through the Air Force Logistics Materiel Control Activity for processing equipment transfers or loans." OSC further explained that it "does not have investigative authority," that it "relies upon the information received from the WB in order to determine whether there is a substantial likelihood that a violation exists," and that the Air Force "was in the best position to determine whether an alternative process existed and whether it applied in this instance." OSC "deemed that to be a fair response to the AF's inquiry and did not receive any indication that the AF needed additional information."

If this were simply a matter of Air Force policy or procedure or a factual issue, OSC's response would be fair. However, the "LMCA allegation" is premised upon fiscal law, for which OSC does not need investigative authority to conduct its required review; nor does it need to rely on the information provided by the whistleblower. Legal research would have revealed that an administrative process cannot provide legal authority for transfer of equipment between federal agencies and that the premise of the referred "LMCA" allegation was a legal impossibility and therefore there could not be a "violation of a law, rule or regulation." Indeed, in its request for clarification, the Air Force specifically explained this legal contradiction, stating that "it is a basic tenet of fiscal law that statutory authority (as opposed to administrative regulation) is necessary for transfers between appropriations." OSC's repeated rationale for referral of this allegation does not recognize or address the flawed legal reasoning underpinning the allegation. In light of this legal incongruity, OSC's response – "if the Air Force was unable to locate such a policy, that conclusion should be articulated in the 1213(c) report" – was particularly unhelpful.

This is a supplement to the Report of Investigation dated January 28, 2013. If you have any questions regarding this request, please contact Deborah Gunn at 703-695-4435 or by email at [Deborah.gunn@pentagon.af.mil](mailto:Deborah.gunn@pentagon.af.mil) or you may contact Major Garrett Condon at 703-695-6552 or by email at [Garrett.condon@pentagon.af.mil](mailto:Garrett.condon@pentagon.af.mil).

Sincerely,

A handwritten signature in cursive script that reads "Cheri L. Cannon".

CHERI L. CANNON  
Deputy General Counsel  
(Fiscal, Ethics and Administrative Law)